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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
 Washington, D.C. 20554

JAN - 6 1998

FEDERAL COMMUNICATIONS COMMISSION  
 OFFICE OF THE SECRETARY

In re Matter of	)	
	)	
Amendment to the Commission's	)	IB Docket No. 95-41
Regulatory Policies to Allow Non-U.S.	)	
Licensed Space Stations to Provide	)	
Domestic and International Satellite	)	
Service in the United States	)	
	)	
Amendment of Section 25.131 of the	)	CC Docket No. 93-23
Commission's Rules and Regulations to	)	
Eliminate the Licensing Requirement for	)	RM-7931
Certain International Receive-Only	)	
Earth Stations	)	
	)	
Communications Satellite Corporation	)	File No. ISP-92-007
	)	
Request for Waiver of Section 25.131(j)(1)	)	
of the Commission's Rules as it Applies	)	
to Services Provided via the Intelsat K	)	
Satellite	)	

### PETITION FOR RECONSIDERATION

PanAmSat Corporation ("PanAmSat"), by its attorneys and pursuant to Section 1.429 of the Commission's rules, hereby submits this petition for reconsideration of the report and order in the above-captioned proceeding released November 26, 1997 ("DISCO II").

### INTRODUCTION AND BACKGROUND

In DISCO II, the Commission adopted a framework for evaluating requests by non-U.S.-licensed satellites for access to the U.S. market. Specifically, the Commission now will presume that entry by satellite systems licensed by WTO-member nations will promote competition in the U.S. satellite services market. Satellite systems licensed by administrations that are not WTO members will

continue to be subject to the Commission's effective competitive opportunities test for satellite systems (the "ECO-Sat test") adopted in DISCO I.<sup>1</sup>

With regard to satellites operated by intergovernmental organizations ("IGOs"), the Commission concluded that they are not entitled to the presumption in favor of entry afforded to satellite systems licensed by WTO-member nations. Nonetheless, the Commission declined to subject IGO satellites to the ECO-Sat test. Instead, the Commission concluded that IGOs seeking to enter the U.S. market should be subject to a more general examination of the competitive effects of such entry.

Specifically, with respect to Intelsat and Inmarsat, the Commission has made a shift in policy that now allows Comsat to provide U.S. domestic service *via* Intelsat or Inmarsat satellites, subject to "an appropriate waiver of immunity" and a public interest showing. With regard to IGO affiliates, the Commission will treat the satellites of IGO affiliates like other, similarly-licensed satellites (*i.e.*, those licensed by WTO members will be entitled to a presumption favoring entry and those licensed by non-WTO members will be subject to the ECO-Sat test). In addition, the Commission will consider "any potential anticompetitive or market distorting consequences of continued relationships or connections between an IGO and its affiliate."<sup>2</sup> This "competitive review" will "reflect any arrangements made by the United States as a result of negotiations involved in the creation of the affiliate."<sup>3</sup>

Finally, although it will not subject IGOs to an ECO-Sat analysis or otherwise assert direct jurisdiction over IGO operations in the U.S., the Commission declined in DISCO II to require receive-only earth stations operating with the Intelsat K satellite or receiving Intelnat I services from Intelsat satellites to be licensed by the FCC.

PanAmSat supports the Commission's general DISCO II approach of allowing satellite operators licensed by other WTO administrations, and by non-WTO

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<sup>1</sup> See Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems, 11 FCC Rcd 2429 (1996) ("DISCO I").

<sup>2</sup> DISCO II ¶ 136.

<sup>3</sup> Id. ¶ 137.

administrations satisfying the ECO-Sat test, to provide satellite service within the U.S. market. PanAmSat opposes, however, the Commission's decision to allow Intelsat to compete in the U.S. domestic satellite market through Comsat.

For the reasons set forth more fully below, therefore, PanAmSat requests that the Commission reconsider the policy it has adopted in DISCO II regarding the use of IGO satellites to provide services in the U.S. domestic market. Moreover, PanAmSat urges the Commission to preserve its opportunity for a *de novo* review of the relationship between Intelsat and its affiliate, INC, when the affiliate seeks access to the U.S. market.

## DISCUSSION

### **I. The Decision To Allow Comsat To Provide U.S. Domestic Service Is Flawed On Procedural and Policy Grounds.**

#### **A. The DISCO II Decision Does Not Satisfy The APA's Standards.**

The FCC's procedures must comport with the Administrative Procedure Act ("APA"), which requires that agencies include in each notice of proposed rulemaking "either the terms or substance of the proposed rule or a description of the subjects and issues involved."<sup>4</sup> The Commission's decision to allow Comsat to provide U.S. domestic services subject to "an appropriate waiver of immunity" and a public interest showing contravenes this requirement.

In the DISCO II NPRM, the Commission proposed to establish a uniform framework for evaluating applications by users in the United States for authority to access satellites licensed by other countries.<sup>5</sup> At that time, the Commission tentatively concluded that it would adopt and apply the ECO-Sat test to determine whether satellites licensed by other countries should be allowed to compete in the U.S. satellite markets. Under the proposed ECO-Sat test, the Commission would evaluate whether U.S. satellite operators had effective competitive opportunities in the home and route markets of the operator seeking to gain entry into the U.S. market.

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<sup>4</sup> 5 U.S.C. § 553(b)(3).

<sup>5</sup> See Amendment to the Commission's Regulatory Policies To Allow Non-U.S.-Licensed Space Stations To Provide Domestic and International Satellite Service in the United States, 11 FCC Rcd 18178 (1996) (the "DISCO II NPRM").

The Commission also considered in the DISCO II NPRM whether and how its proposed ECO-Sat test should apply to IGOs such as Intelsat and Inmarsat. The Commission noted that the application of its proposed ECO-Sat test to Intelsat and Inmarsat and their affiliated companies would present a number of problems because Intelsat and Inmarsat do not have a "home market" *per se* to which the ECO-Sat test could be applied and they have such ubiquitous service routes that it would be impossible or impractical to evaluate Intelsat or Inmarsat route markets.<sup>6</sup>

Before issuing a final order in this proceeding, however, the WTO Agreement on Basic Telecommunications Services was concluded, which imposed upon the U.S. and other WTO-member nations certain reciprocal market opening obligations. Consequently, the Commission issued a further notice of proposed rulemaking ("FNPRM") in this docket to revisit the issues raised in the DISCO II NPRM and to implement its market opening program consistent with U.S. obligations under the WTO Agreement.<sup>7</sup> The only issues raised in the FNPRM regarding IGOs, however, involved the mechanics of applying the ECO-Sat test to IGOs.<sup>8</sup>

Nowhere in either the DISCO II NPRM or the FNPRM did the Commission state that it was considering, nor did it seek comment upon, an approach that would simply allow Comsat to provide U.S. domestic service using Intelsat or Inmarsat satellites subject to an unspecified waiver of its derivative immunity. The only mention in either of the notices in this proceeding of a policy proposal even marginally related to that adopted in DISCO II was a "final alternative" offered in the DISCO II NPRM in which the Commission noted that, in *lieu* of the ECO-Sat test, it might "apply a much less structured standard that focuses directly on the competitive consequences of an IGO providing domestic service within the United States."<sup>9</sup> Nothing more was said about the details of this "final alternative."

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<sup>6</sup> DISCO II NPRM ¶¶ 62-74.

<sup>7</sup> See Amendment to the Commission's Regulatory Policies To Allow Non-U.S.-Licensed Space Stations To Provide Domestic and International Satellite Service in the United States, IB Docket No. 96-111, *et al.* (rel. July 18, 1997) (the "FNPRM").

<sup>8</sup> FNPRM ¶ 33.

<sup>9</sup> DISCO II NPRM ¶ 68.

Nonetheless, having never actively sought public comment on the approach, the Commission adopted in DISCO II a policy that will allow Comsat to provide U.S. domestic service using Intelsat and Inmarsat satellites, subject to "an appropriate waiver" of its immunity and a showing, the details of which remain unspecified, that such service will promote competition and not be contrary to the public interest.

Although final agency rules need not be identical to proposed rules, due process and the APA require that they must, at minimum, be a "logical outgrowth" of the proposed rules.<sup>10</sup> The Commission's decision to allow Comsat to provide U.S. domestic service using IGO satellites fails this test. The dearth of public comment in the record on this highly contentious issue evidences the disjunction between the notices of proposed rulemaking and the final policy adopted in this proceeding.

At minimum, however, even if not a violation of the APA, the final policy adopted in DISCO II does not satisfy the Commission's high standards for administrative rulemaking. Allowing Comsat to provide U.S. domestic service will have far reaching affects on the domestic satellite services industry. Such a policy change, therefore, should have been subject to full and complete public comment. Instead, the policy was, at best, merely hinted at in the notices of proposed rulemaking and the adopted without significant public participation.

The Commission should, therefore, reconsider its decision to allow Comsat to enter the U.S. domestic market and, at minimum, seek further comment on the issue.

**B. The Decision To Allow Intelsat, Through Comsat, To Provide U.S. Domestic Satellite Services Absent More Rigorous Competitive Safeguards Is Flawed As A Matter Of Policy.**

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As the Commission recognized in DISCO II, the IGOs have "unique characteristics as treaty-based organizations that could enable them to distort competition."<sup>11</sup> With respect to Intelsat and Inmarsat, these "unique characteristics" include, not only immunity from suit in the U.S., but also superior market access worldwide. In addition, aside from Intelsat's and Inmarsat's direct

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<sup>10</sup> E.g., Fertilizer Inst. v. EPA, 935 F.2d 1303, 1311 (D.C. Cir. 1991).

<sup>11</sup> DISCO II ¶ 125.

immunity, "Comsat, in its role as the U.S. Signatory to Intelsat and Inmarsat, also benefits from [derivative] immunities."<sup>12</sup>

For these reasons, the Commission properly was skeptical of the claims by Comsat that it would "enjoy no special advantages over other providers of satellite services in the United States."<sup>13</sup> Nonetheless, rather than continuing to exclude Intelsat and Inmarsat from the U.S. domestic market or conditioning entry by Intelsat and Inmarsat on compliance with safeguards designed to address each treaty-based market advantage, the Commission concluded that it would allow them to enter and compete freely in the U.S. domestic satellite markets subject only to two qualifications. First, Comsat will be required to make "an appropriate waiver of immunity from any suit as part of its application to provide domestic service *via* Intelsat or Inmarsat."<sup>14</sup> In addition, Comsat will be required to show that entry into the United States domestic market by Intelsat or Inmarsat will promote competition and not otherwise be contrary to the public interest.<sup>15</sup>

Although the Commission outlined in DISCO II the general nature and scope of this second "competitive-effect" inquiry, it is impossible at this point to determine the extent to which this inquiry will be used to address market access problems overseas (*i.e.*, whether the Commission will employ an ECO-Sat-like analysis) or how far the Commission might go to remedy the existing competitive imbalances relating to IGO services. In addition, although Intelsat and Inmarsat entry will be conditioned upon some form of waiver of Comsat's derivative immunity, the Commission in no way addresses the IGOs' direct immunity.

On reconsideration, therefore, the Commission either should continue to exclude IGO satellites from the U.S. domestic market entirely or, if Comsat is permitted to "resell" IGO facilities in the U.S., the Commission should: (1) require, as a condition of Intelsat or Inmarsat entry, not only a waiver of Comsat's derivative immunity, but also a waiver by the IGO involved of its direct immunity from suit

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.* (citing Amendment to the Commission's Regulatory Policies To Allow Non-U.S.-Licensed Space Stations To Provide Domestic and International Satellite Service in the United States, IB Docket No. 96-111, Reply comments of Comsat (filed. Sept. 5, 1997)).

<sup>14</sup> DISCO II ¶ 126.

<sup>15</sup> *Id.*

in the U.S.; (2) require IGO compliance with strict accounting safeguards to protect against cross-subsidization of its services in the U.S. market with monopoly revenues from non-competitive international route market services; and (3) impose unbundling requirements upon Comsat to prevent it from leveraging Intelsat's privileged market access overseas and dominance on thin routes to gain a competitive advantage in the U.S. domestic market.

1. IGOs seeking entry into the U.S. market should be required to waive any immunity from suit in the U.S. that they enjoy.

Contrary to the implication in DISCO II, not only does Comsat's derivative immunity as a Signatory to Intelsat and Inmarsat pose a threat to competition in the U.S., but the direct immunity enjoyed by those IGOs also provides Comsat with an enormous advantage in the market. Indeed, it is the satellite systems of the IGOs, not the Signatory "resellers," with which private operators actually compete. Thus, as a condition of entry into the U.S. market, not only Comsat, but Intelsat and Inmarsat should be required to waive whatever immunity from suit and regulatory oversight they enjoy with respect to the relevant services.<sup>16</sup>

As the Commission has itself noted, Intelsat is a "large intergovernmental organization born of privilege, benefiting early in its development from U.S. taxpayer-funded research and development, and nurtured by years of Commission regulatory policies designed (successfully) to ensure its commercial viability."<sup>17</sup> Intelsat's privileges and immunities include, among other things, an exemption from regulatory oversight, immunity from U.S. antitrust laws, privileged access to orbital locations, and an exemption from most forms of taxation.

Most importantly from a competitive standpoint, these privileges and immunities provide Intelsat, operating in the U.S. through Comsat, with unique market advantages, including the ability to engage in anticompetitive conduct.

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<sup>16</sup> The Commission has authority under Section 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. § 303(r) to condition licenses as necessary to carry out the provisions of the Act. Conditioning any access by Comsat, or the IGO, to the U.S. domestic market on a voluntary waiver of immunity by the IGO would not violate any other provision of law or otherwise be prohibited by the Communications Act.

<sup>17</sup> Columbia Communications Corp., 11 FCC Rcd 13709 (1996).

Examples of Intelsat's ability and willingness to engage in anticompetitive practices, including the adoption of a market boycott of PanAmSat and the use of its Article XIV consultation process as a competitive weapon, are well known to the Commission and need not be recited at length here. A waiver only of Comsat's derivative immunity will do little to combat these practices. Comsat is merely a reseller of Intelsat and Inmarsat space segment. The operations of Comsat and the IGOs to which it is a Signatory form an integrated whole. To the extent that the combined enterprise therefore intends to use rates, terms, or conditions, that would otherwise violate the law, it still may do so by sheltering these activities in the part of the combined enterprise that retains its immunity —the IGOs themselves.

Simply stated, the IGOs enjoy market advantages by virtue of their intergovernmental status that purely private competitors do not enjoy, but with which they must compete. Thus, whether or not Comsat waives its derivative immunity, Intelsat and Inmarsat should not be permitted to provide service in the U.S. domestic market so long as their activities remain shielded from judicial review by their direct IGO immunity.

2. **IGOs seeking entry into the U.S. market should be required to comply with accounting safeguards designed to prevent cross-subsidization of competitive services in the U.S.**

The Commission's own analysis indicates that Intelsat/Comsat retains market power in at least two separate product or service markets: occasional video and switched-voice and private-line services on "thin routes" (*i.e.*, routes that are not served by submarine cable or on which satellite capacity is required for necessary redundancy).<sup>18</sup> Thus, unless the Commission is willing to exercise jurisdiction over Intelsat's space segment, including Intelsat pricing structures, or it concludes on reconsideration that Intelsat and Inmarsat should remain excluded from the U.S. domestic market as PanAmSat has suggested, there is a significant risk that Intelsat and Inmarsat will, acting through Comsat, undercut competitors in the domestic

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<sup>18</sup> See Comsat Corporation Petition for Partial Relief from the Current Regulatory Treatment of Comsat World Systems' Video and Audio Services, File No. 14-SAT-ISP-97 (rel. Aug. 14, 1997) ¶¶ 38 *et seq.*; Comsat Corporation Petition for Partial Relief from the Current Regulatory Treatment of Comsat World Systems' Switched Voice, Private-Line, and Video and Audio Services, RM-7913 (rel. Aug. 15, 1996) ¶¶ 25-26.



market by cross-subsidizing competitive services with revenues derived from monopoly international route markets that they serve.

The Commission's ECO-Sat analysis (for satellites licensed by non-WTO members) effectively will prevent precisely this kind of cross-subsidization by foreign satellite systems that serve markets that have not been opened to multiple competitors. Under the DISCO II framework, however, no comparable mechanism exists, without "piercing the veil" between Intelsat and Comsat, to prevent Intelsat/Comsat from acting in such an anti-competitive manner.

Therefore, if Intelsat and Inmarsat are to be allowed to compete in the U.S. domestic market, they should be required to comply with strict accounting safeguards designed to deter cross-subsidization of any domestic capacity provided. These safeguards should include, at minimum, full space segment cost and rate-making disclosure requirements. Absent voluntary compliance with accounting safeguards, competitors will have no protection against predatory practices paid for by Intelsat's captive ratepayers in other markets.

3. **Comsat should not be allowed to bundle domestic and international satellite services.**

In addition to an IGO waiver of immunity and IGO compliance with accounting safeguards, the Commission should impose upon Comsat a domestic-international services unbundling requirement to prevent it from leveraging Intelsat's privileged market access overseas to gain a competitive advantage in the U.S. domestic market.

As the Commission consistently has found, Intelsat and Inmarsat have superior access to foreign markets. The vast majority of Intelsat Signatories are foreign PTTs, which, in many cases, are monopolists in their home markets. For this reason, Intelsat and Inmarsat have automatic access to virtually every market in the world and the ability to exclude competitors from those markets when it suits their interests.<sup>19</sup> In addition, Intelsat retains market power in at least two product

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<sup>19</sup> See Comsat Petition for Partial Relief from the Current Regulatory Treatment of Comsat World Systems' Switched Voice, Private Line, and Video and Audio Services, 11 FCC Rcd 9622, 9635 (1996).

and service markets — occasional video and thin route telephony. These advantages ultimately can be used by Comsat to distort competition.

As the Commission itself has recognized, the global nature of communications needs is changing the way satellite services are offered; "users whose communications requirements were once wholly domestic now need international space segment capacity" and vice versa.<sup>20</sup> The prospect of Intelsat and Inmarsat competing in the U.S. domestic market, with their privileged access to overseas markets and dominance in occasional video/thin route telephony, thus presents an enormous potential for competitive abuse. To the extent that Comsat is allowed to tie or bundle a service offering on a monopoly Intelsat or Inmarsat route to a domestic transmission, it can leverage an anticompetitive condition in the international markets to enhance its competitive position in domestic markets.

Again, however, nothing in the Commission's new DISCO II policy appears to address this competitive threat. To the contrary, under the DISCO II approach, if a Comsat application to provide domestic service is approved, it would seem that Comsat would be free to bundle services on routes in which it has market power with domestic services. The result can only be bad for competition and bad for consumers. Thus, if Comsat is to be allowed to provide U.S. domestic services, it should be prohibited from bundling those services with international transmission capacity provided by an IGO.

**II. It Is No Longer Appropriate To Exempt From Licensing Receive-Only Earth Stations Used To Access Intelsat K Transmissions And Intelnet I Services.**

PanAmSat supports the decision in DISCO II to relieve non-U.S. satellites from the obligation of obtaining a U.S. space station licenses when providing U.S. service and, instead, to use the earth station application process to ensure compliance with the Commission's rules and policies. Given this new regulatory framework, however, it is now doubly important that the Commission require a license for the use of receive-only earth stations when they are used to access non-U.S. satellites. The Commission's earth station licensing process may be the only point of contact with U.S. regulatory authorities for many new market participants.

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<sup>20</sup> DISCO I, 11 FCC Rcd 2429 (1996).

This is no less true when Intelsat satellites are involved. In this regard, it is no longer appropriate for the Commission to permit receive-only earth stations to receive Intelsat K satellite transmissions and Intelnet I services without first obtaining a license. Unless a license is required, the Commission will have no mechanism to ensure compliance with its technical rules and competitive policies. The Commission should, therefore, reconsider this aspect of the DISCO II decision.

**III. The Commission Should Take Steps To Ensure That Its Competitive Review Of IGO Affiliates Remains Independent.**

In DISCO II, the Commission has stated that its "competition review" of any request for IGO affiliate entry to the U.S market will reflect "any arrangements agreed to by the United States" as the result of international negotiations among IGO members regarding the creation of such affiliates. The Commission added that, as part of its public interest analysis, it will take into account views expressed by the Executive Branch, since the Executive Branch is involved in such negotiations.<sup>21</sup>

The Commission, however, is a key participant in the negotiations, working with the Department of State and the Department of Commerce in developing the Executive Branch position regarding the establishment an Intelsat affiliate. Later, the FCC will be called upon to sit in judgment of its own efforts and those of the Executive Branch agencies. If the Executive Branch finds the competitive safeguards affecting the affiliate to be adequate, as a practical matter, the Commission's tendency will be to support that finding in its own competitive review.

PanAmSat supports the Commission's involvement in the work of the Executive Branch agencies to find effective competitive safeguards for the Intelsat affiliate. PanAmSat, however, is troubled by what may appear to be a conflict between the FCC's participation in the Executive Branch process and its own independent responsibilities as a regulatory agency. Although the Executive Branch agencies have made a valued effort to keep interested parties informed and involved in the international negotiations process, that process is not characterized by type of transparency required by the FCC's own procedures.

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<sup>21</sup> DISCO II ¶137.

Given the lack of sufficient transparency and the Commission's dual role both as one of the architects of the Executive Branch policy and as the "judge" of that policy's adequacy, there is a risk that the public may never have a meaningful opportunity to comment on the competitive safeguards that would be appropriate to permit IGO affiliate entry. The Commission should, therefore, take whatever steps are necessary in order to preserve the independence of its competitive review of future IGO affiliate applications.

#### CONCLUSION

For the reasons set forth above, the Commission should reconsider its decision to allow Intelsat, through Comsat, to provide U.S. domestic services and its decision to exempt from licensing receive-only earth stations operating with the Intelsat K satellite or receiving Intelnet I services. Further, the Commission should take whatever measures are necessary to preserve its independent review of IGO-affiliate applications to access the U.S. market.

Respectfully submitted,

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